

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

David Halterman,

NO. C 04-02660 JW

Plaintiff(s),

**ORDER DENYING PLAINTIFF'S  
MOTION TO EXCLUDE THE  
TESTIMONY OF DR. JOHN ZEITZ**

v.

Legato Software, a Division of EMC  
Corporation, et al.,

Defendant(s).

Plaintiff David Halterman initiated this suit for wrongful termination against his former employer Legato Software, a Division of EMC Corporation, and EMC Corporation dba EMC Peripherals, Inc. Inasmuch as Plaintiff's prayer for relief included emotional distress damages, Plaintiff was ordered to undergo a mental examination under Rule 35, Fed.R.Civ.P., by Defendants' retained expert, Dr. John Zeitz. See Magistrate Judge Trumbull's Order Granting in Part and Denying in Part Motion to Compel an Independent Mental Examination and Answers to Deposition Questions ("Magistrate Judge's Order").

Presently before the Court is Plaintiff's motion to exclude Dr. Zeitz's testimony in its entirety on the grounds that (1) the examination was, in essence, used as an improper second deposition; (2) the scope of the examination violated the Magistrate Judge's Order and (3) Dr. Zeitz's report is "replete with patently inappropriate analysis and non-expert opinion." Plaintiff's Motion, pp. 13-14. The Court finds it appropriate to take the motion under submission for decision without oral argument pursuant to Civil Local Rule 7-1(b).

1 Based upon all papers filed to date, the Court finds that Dr. Zeitz neither conducted an  
2 improper second deposition, nor exceeded the scope of the Magistrate Judge's Order. It was  
3 appropriate for Dr. Zeitz to review the factual details of Plaintiff's employment, including his  
4 interactions with other employees, e-mails, memos, and performance reviews. It was also  
5 appropriate for Dr. Zeitz to review details of Plaintiff's past employment with OSI.

6 The Court, however, finds that portions of Dr. Zeitz's report contain inappropriate analysis  
7 and non-expert opinion. Rather than attempt to delineate which portions of the report should be  
8 excluded in the context of the instant motion, the Court prefers to conduct a conference to establish a  
9 set of ground rules for Dr. Zeitz's expert testimony at trial.

10 In conclusion, the motion to exclude Dr. Zeitz's testimony in its entirety is denied. The  
11 Court will conduct a conference regarding the scope of Dr. Zeitz's testimony on May 18, 2006 at  
12 11:00 a.m.

13 Dated: March 22, 2006

14 04cv2660zeitz

/s/James Ware  
JAMES WARE  
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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9  
10 **Dated: March 23, 2006**

**Richard W. Wieking, Clerk**

11  
12 **By: /s/JW Chambers**

**Melissa Peralta  
Courtroom Deputy**